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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 362

VINCENT FRANCIS McGEE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions in the court of appeals (A. 61–89)[1] are reported at 426 F. 2d 691. The opinion of the district court denying petitioner's motion to dismiss (A. 7–16) is not reported.

JURISDICTION

The judgment of the court of appeals (A. 90–91) was entered on March 31, 1970. A petition for rehearing with a suggestion of rehearing *en banc* was

[1] "A." refers to Appendix in this Court; "Tr." refers to the trial transcript; "G. Ex." refers to government trial exhibits, consisting of excerpts from petitioner's Selective Service file. These materials are on file with the Clerk.

denied on May 7, 1970 (A. 92–93). On June 1, 1970, Mr. Justice Harlan extended petitioner's time for filing a petition for a writ of certiorari until July 6, 1970, and the petition was filed on that date. This Court granted certiorari on October 19, 1970 (A. 94). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's intentional failure to pursue his conscientious objector claim before his local draft board and to appeal from its denial by the board precluded him from challenging that denial at his trial for refusal to submit to induction.

2. Whether petitioner can raise as a defense at his trial a contention that he should have been exempted as a ministerial student when he never requested such an exemption from his local board and never demonstrated, even at trial, that he in fact qualified for such an exemption.

3. Whether petitioner's conviction for wilfully refusing to submit requested information to his local board is valid and whether the court of appeals in any event properly declined to review this conviction in view of the concurrent sentence.

4. If the Court should determine that petitioner was entitled to an exemption, whether that gives him a defense to prosecution for failure to report as ordered for a pre-induction physical examination and for failure to maintain his Notice of Classification in his possession.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on all counts of a four-count indictment charging that he knowingly failed to submit to induction into the Armed Forces (Count I), report for a scheduled pre-induction physical examination (Count II), keep in his possession a valid Notice of Classification (SSS Form 110) (Count III), and provide his local board with information concerning his draft status as requested in a Current Information Questionnaire (SSS Form 127) (Count IV), all in violation of 50 U.S.C. App. 462(a) and various designated Selective Service regulations[2] (A. 4–6; Tr. 299). On January 16, 1969, he was sentenced to two years' imprisonment on each count, the terms to run concurrently (A. 2). The court of appeals affirmed, one judge dissenting (A. 61–91).

1. On September 7, 1961, following his eighteenth birthday, petitioner registered with his local Selective Service board in New York City and informed the board that he was a student at Cathedral College of St. Joseph's Seminary, preparing for the ministry under the direction of the Roman Catholic Church (G. Ex. 3, p. 4, A. 44; G. Ex. 1). In August 1963, he advised the board in a Current Information Ques-

[2] See 32 C.F.R. 1632.14 (duty of registrant to report for and submit to induction); 32 C.F.R. 1628.16 (duty to report for and submit to pre-induction physical examination); 32 C.F.R. 1623.5 (duty to maintain possession at all times of valid Notice of Classification showing current classification); 32 C.F.R. 1641.7(b) (duty to submit in writing information concerning draft status requested by local board).

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tionnaire and accompanying letter that he had taken a leave of absence from that institution the preceding January for financial reasons; that he intended to resume his studies there in September 1964; and that he had been working in the interim as a clerk in a law firm while attending night classes at Hunter College (G. Ex. 4). In September 1963, he was classified I–A (G. Ex. 3, p. 8, A. 44).

In August 1964, petitioner was ordered to take, and he took and passed, a pre-induction physical examination (G. Ex. 3, p. 8, A. 44; G. Exs. 5, 5A). Shortly thereafter, he advised the local board that he had registered at the University of Rochester in a pre-matriculation program that would lead ultimately to a Bachelor of Arts degree. Seeking to obtain a "delayed draft status," he asked the board to advise him whether he should remain in Class I–A and have his induction delayed until the completion of his studies or request II–S (student deferment) status until his graduation (G. Ex. 6). The board responded that, since petitioner's file did not contain a Student Certificate (SSS Form 109) from his university certifying his student status, one should be forwarded (G. Ex. 7). The requested certificate was received and, in October 1964, petitioner was classified II–S (G. Ex. 3, p. 8, A. 44; G. Ex. 8). Except for a brief period in 1965 not here pertinent, he retained that classification until September 1967 (G. Ex. 3, pp. 8-9, A. 44).

On February 12, 1966, while a third-year student at Rochester, petitioner advised his local board that he wished to declare himself a conscientious objector to

war (G. Ex. 13). The board sent him SSS Form 150 (Special Form for Conscientious Objector) which petitioner completed and returned (G. Ex. 16, A. 48).[3] In filling out the form, petitioner crossed out both the printed statement of claim to exemption from combatant service only ("statement A") and the printed statement of claim to exemption from both combatant and noncombatant military service ("statement B"), explaining that "[n]either A, nor B are acceptable" (G. Ex. 16, p. 1, A. 48). In an attached "additional claim and statement," he stated that he was con-

[3] Petitioner stated in the Form that he believed "in a personal Supreme Being to whom obligation is superior when duties of human relations are considered"; that he felt that "taking part in any form of military operation indicates an approval/consent situation repugnant to [his] belief in duties consequent to love and service of God and fellow man"; and that his beliefs derived "from usual religious indoctrination and rearing of a Roman Catholic whose home is a religiously oriented one * * *." He believed in "no use of force beyond the personal physical restraint—without any material arms being used—of any individual bent on harming another person when verbal and moral force of example have been exhausted." In response to a request that he describe the actions of his life which he believed most conspicuously demonstrated the consistency and depth of his religious convictions, he said that he had determined on a vocation to the religious life at an early age; that he had spent 5½ years in an official minor seminary of the Catholic Church; that he had left the seminary in order to "live more closely associated with the concrete situation of modern man while keeping a sense of vocation and dedication to God and men clearly in sight"; and that it was his intention to "continue on to actual ordained Priesthood" (G. Ex. 16, pp. 1–2, A. 48).

The majority below acknowledged that petitioner had submitted a *prima facie* claim to conscientious objector status under the statute (50 U.S.C. App. 456(j)), and that finding is not disputed here.

scientiously opposed to, and claimed exemption from, "obligatory compensatory service in civilian work" as well as military service (G. Ex. 16, A. 48).

On March 23, 1966, the clerk of the local board wrote petitioner that the "recent evidence" he had submitted had been reviewed by the board and the board had decided it did not justify a reopening of his case and reconsideration of his II–S classification; however, he was told his claim to conscientious objector status would be considered when he no longer qualified for a student deferment (A. 62–63; G. Ex. 18). According to the official minutes of the board, this action was taken following a 4–0 vote of the board not to reopen (G. Ex. 3, p. 9, A. 44). Petitioner took no further action in the matter.

Thereafter, petitioner requested a renewal of his II–S classification (A. 63; G. Exs. 21, 22). The Colgate Rochester Divinity School certified to the local board in September 1966 that petitioner was carrying seven hours of course work at that school, in addition to his regular work at the University of Rochester, which would be credited toward his Rochester degree (G. Ex. 23). Petitioner's II–S classification was thus renewed in October 1966 (G. Ex. 3, p. 9, A. 44).

On April 15, 1967, while a senior at Rochester, petitioner wrote a letter to President Johnson, enclosing remnants of his torn and burnt registration certificate (SSS Form 2) and classification notice (SSS Form 110) (G. Ex. 25, A. 50; Tr. 115–117). He stated that, though he had been "accepted for graduate study in a program where [he] would probably qualify for the theological deferment," he felt compelled to "sever

every link with violence and war" and adopt a position of "non-cooperation with the military-industrial complex which seems to be dictating our international policy" (G. Ex. 25, A. 50). Petitioner's local board received a copy of this letter from the New York City Selective Service Headquarters, to which it had been referred through official channels (G. Ex. 25, A. 50; G. Ex. 3, p. 9, A. 44). In May 1967, the board considered, but decided against, reopening petitioner's II–S classification, retaining him in that status (A. 63; G. Ex. 3, p. 9, A. 44).

Petitioner graduated from the University of Rochester with a Bachelor of Science degree in June 1967 (G. Ex. 28; Tr. 113). On July 3, the board sent him a Current Information Questionnaire (SSS Form 127), with the instruction that he return it by July 13 (G. Ex. 30, A. 52). It was explained on the face of the Form that the law required the recipient to "fill out and return this questionnaire" in order that the board might have current information needed to classify him. The information sought included specifics as to the registrant's educational attainments, whether or not he would be a full-time student during the following semester, and, if so, at what school. The registrant was also told that he might attach any additional information he believed should be brought to the board's attention (*ibid*).

On July 23, 1967, petitioner returned the questionnaire unanswered. In an accompanying letter, he advised the board that he did not intend to respond and that any further communications from the board would be returned unopened, "consistent with my be-

lief that cooperation is approval of actions and policy which in conscience I can have nothing to do with" (G. Ex. 30, Ltr. of 7/23/67, A. 52).

Petitioner was reclassified I–A on September 19, 1967 (G. Ex. 3, p. 9, A. 44). The following day he was mailed a Notice of Classification (SSS Form 110) and a letter advising him that he had a right to request a personal appearance before the board or to take an appeal within 30 days, that the board had a government appeal agent available to aid him with such appearance, appeal, or other procedural right, and that the appeal agent or his representative would give petitioner free legal counsel on any Selective Service matter (A. 63–64; G. Ex. 31). Petitioner returned the communication unopened, writing on the envelope "Refused pursuant to previous declaration and notification" (A. 64; G. Ex. 32).

On October 4, 1967, petitioner was ordered to report for a pre-induction physical examination on October 18. He returned the order to the board unopened, similarly writing on the envelope "Refused pursuant to previous notification and statement," and failed to report for the examination (G. Ex. 33, A. 54). On November 21, 1967, he was declared delinquent and the following day was sent a delinquency notice; however, this too was returned unopened, the envelope similarly endorsed (G. Ex. 3, last page, A. 44; G. Ex. 34). He was ordered on January 11, 1968, to report for induction on January 29. This time he did report on the scheduled date, took and passed a physical examination, and was found qualified for induction. He refused, however, to take the symbolic step for-

ward when called, giving as his reason his "moral and religious beliefs" (G. Ex. 3, last page, A. 44; G. Ex. 38, A. 56; G. Exs. 35, 37; Tr. 61–62, 136–137).

Prior to receiving his order to report, but within the thirty-day period within which to appeal his I–A classification, petitioner had on September 27, 1967, matriculated at Union Theological Seminary, a non-denominational institution to which he had been recommended by his parish priest (A. 22, 64; Tr. 85, 90–91, 93–94). However, at no time did he submit to his local board a request for a IV–D (ministerial student) classification, nor did he ever advise the board that he was attending the institution (A. 37, 64, 68). Moreover, there was no evidence at trial that petitioner was preparing for the ministry under the direction either of the Catholic Church or of any other church or religious organization, as would be required for an exemption under Section 6(g), 50 U.S.C. App. 456(g); while there were other Catholic students at the Seminary, who had expressed an intention of becoming priests, most of these were enrollees at Catholic seminaries who were merely taking courses at Union as non-matriculants (A. 22–23).

2. At petitioner's trial, Jerome Lande, the chairman of the local board, was questioned (as a defense witness) outside the presence of the jury about the initial denial in March 1966 of petitioner's request for conscientious objector status, and also about the subsequent reclassification, in September 1967, from II–S to I–A. Mr. Lande testified that when the conscientious objector application was originally filed, he thought "there weren't sufficient facts in that to motivate me to grant

the registrant the request he sought" (A. 26). When shown Government Exhibit 18—the letter of March 23, 1966, from the clerk of the local board to petitioner advising him that his conscientious objector claim would be considered when he no longer qualified for a student classification—the chairman denied having instructed the clerk so to inform petitioner (A. 26–27). He said he had denied the application "because the young man was attending college and in my judgment he rated a 2S qualification [*sic*] which we proceeded to give him" (A. 27).[4] Asked by counsel if he had not previously stated that the denial was due to petitioner's "beliefs," the chairman testified: "I did not say anything at all about his beliefs. * * * I said in my opinion what he set forth did not motivate me to grant him the relief he sought" (A. 27). Although the minutes of the board's actions, as recorded on petitioner's classification questionnaire, indicate that the decision not to reopen was by a 4–0 vote (G. Ex. 3, p. 9, A. 44), Mr. Lande testified that the determination was made by him in his individual capacity as chairman (A. 27–28, 30–31).

When petitioner was reclassified I–A in September 1967, Mr. Lande testified, all members of the board participated and the 5–0 decision was taken after "we again reviewed what appeared in the file" (A. 29, 34–35). "Based on our previous determination that his request for conscientious objection status was denied,"

[4] When government counsel, in an ensuing colloquy, observed to the court, "Your Honor, I think Mr. Lande has testified that Mr. McGee was a student at that time and therefore they gave him a 2S classification," the chairman said, "I did state that" (A. 27).

the chairman said, "we had no alternative at that time but to give him a 1A, which we did" (A. 35). The following exchange between defense counsel and the chairman then occurred (A. 35):

> Q. You didn't consider the conscientious objector claim again because it had been denied previously?
>
> A. Yes——

Mr. Lande's answer was interrupted by government counsel, who interjected: "The witness has already testified he did consider" (A. 35). The chairman later made clear that the entire board "reviewed the record of the young man's case when we gave him the 1A and all pertinent information therein contained" (A. 36-37).

A motion for acquittal, based in part on the claimed failure by the board to "reconsider defendant's application for conscientious objector [status]" on the occasion of his September 1967 reclassification to I–A (A. 40), was denied (Tr. 245). Following the verdict, the trial court found as a fact that the local board "considered the defendant's application for a conscientious objector status" when it reclassified him I–A on September 19, 1967 (A. 41–42).

SUMMARY OF ARGUMENT

I.

A. More than 25 years ago, this Court established, in *Falbo* v. *United States,* 320 U.S. 549, and *Estep* v. *United States,* 327 U.S. 114, that a Selective Service registrant is required, except in rare cases involv-

ing unusual circumstances, to exhaust his administrative remedies; his failure to do so precludes a challenge to the validity of his assigned classification in defense to a criminal prosecution for failure to submit to induction. The recent decision in *McKart* v. *United States*, 395 U.S. 185, does not abrogate that general principle. There, in declining to apply the exhaustion doctrine in the particular situation presented, the Court relied on the fact that the question on which McKart's classification had depended—the meaning of the "sole surviving son" exemption of 50 U.S.C. App. 456(o)—was solely one of law, which the courts could resolve without further assistance or enlightenment from the administrative boards. However, it expressly noted that the result might well be otherwise where the failure to take advantage of administrative remedies deprives the Selective Service System of an opportunity to assess a claim to exempt status which by nature calls for special "expertise or the exercise of discretion, both by the local boards and the appeal boards" (395 U.S. at 198).

This is just such a case. The classification question involved here is not solely one of statutory interpretation; its resolution, instead, requires precisely the kind of factual analysis that Congress intended should be left, in the first instance, to the discretion and expertise of the Selective Service System. Whether petitioner is entitled to conscientious objector status turns essentially on the sincerity of his beliefs. Yet, petitioner's failure to contest his classification before his local board or to appeal adminis-

tratively effectively denied the administrative system an opportunity to correct its alleged error by passing on that aspect of his claim, or to apply its full expertise to the evaluation of his written submission.

If registrants seeking exemption as conscientious objectors are permitted thus to bypass with impunity the established administrative machinery for fact-finding and review, there exists a real possibility that the effectiveness of the System will be weakened. For, it will enable such registrants, as happened in this case, to bring before the courts, in the context of criminal prosecutions, *prima facie* claims to exempt status without having them meaningfully examined by the administrative agency from the point of view of the registrant's sincerity, and thus, on a carefully drawn SSS Form 150, be virtually assured of acquittal on the ground that the record shows "no basis in fact" for denial of a conscientious objector exemption.

B. Petitioner's additional contention that he was erroneously denied a IV–D (ministerial student) classification on the basis of his matriculation at Union Theological Seminary in September 1967, a few months before he was ordered to report for induction, is without merit. Not only did he never request such an exemption, but, indeed, petitioner never even advised the board that he was attending the institution in question. Thus, with respect to his IV–D claim, petitioner failed not only to exhaust his administrative remedies, but even to invoke them in the first instance.

Moreover, even assuming such a claim had properly been placed before the the local board, petitioner would

not have been entitled to the classification. For, to qualify as a ministerial student, a registrant must be satisfactorily pursuing a full-time course of instruction in a recognized divinity school *and* be "preparing for the ministry under the direction of" a recognized church or religious organization (50 U.S.C. App. 456(g); 32 C.F.R. 1622.43(a)(3). Even at trial, when petitioner first claimed this exemption and evidence on the issue was liberally received, there was no proof that the latter requirement was met.

II.

A. Affirmance of Count I would obviate consideration of the other counts. Petitioner's challenge to his convictions on Counts II (failure to report for his pre-induction physical examination) and III (failure to keep in his possession his I–A Notice of Classification) both presuppose the invalidity of the I–A classification upon which the Count I conviction rests. With respect to Count IV (refusal to furnish the local board with the information requested in the Current Information Questionnaire), this Court could appropriately decline to consider it under the concurrent sentence doctrine if the basic conviction for failure to submit to induction is affirmed.

B. Even assuming this Court should reverse petitioner's basic conviction for failure to submit, the convictions on the subsidiary counts should stand. A registrant is not relieved of his obligation to obey an order to report for a physical examination merely because his classification is invalid. Nor, for that reason, can it reasonably be maintained that he has no

obligation to retain possession of the Notice of Classification. And the final contention by petitioner—that his deliberate failure to provide his local board with requested information can be disregarded as nothing more than a "technical" violation—is equally without merit. There is, however, no cause for this Court to decide these questions even if petitioner's basic conviction is reversed. Since the issues raised with respect to each of these subsidiary counts are not of such import as to require this Court's immediate attention, it would be entirely appropriate to remand them for consideration by the court of appeals.

ARGUMENT

I. PETITIONER'S CONVICTION ON COUNT I, FOR FAILURE TO SUBMIT TO INDUCTION, IS VALID

The Selective Service System was designed by Congress for the purpose of mobilizing the nation's manpower in an orderly and efficient manner, with the least possible recourse to the courts on questions of classification.[5] To this end, Congress and the President have devised an elaborate administrative appeal machinery to ensure, as far as possible, that errors in

[5] Section 10(b)(3) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. V) 460(b)(3)) provides in pertinent part:

"No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution * * * after the registrant has responded either affirmatively or negatively to an order to report for induction * * *. *Provided*, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards and the President only when there is no basis in fact for the classification assigned to such registrant."

classification are corrected administratively within the System.[6] See *United States* v. *Palmer*, 223 F. 2d 893, 896 (C.A. 3), certiorari denied, 350 U.S. 873.

This Court has consistently shunned interference with that carefully constructed administrative review process. Thus, in *Estep* v. *United States*, 327 U.S. 114,

[6] The pertinent provisions of the statute and the regulations which establish this administrative review machinery include, *inter alia*, Sections 10(b)(2) and 10(b)(3) of the Selective Service Act (50 U.S.C. App. 460(b)(2) and (3)), as amended, which contain general provisions relating to State Directors, State Appeal Boards, and review by the President or his delegate (see 50 U.S.C. App. 460(c)), and a number of sections of the Selective Service System regulations, including 32 C.F.R. 1604.6 (creating and prescribing the duties of the National Selective Service Appeal Board), 32 C.F.R. 1604.21 *et seq.* (relating to the organization and composition of State Appeal Boards), 32 C.F.R. 1604.71 (providing for the appointment and prescribing the duties of government appeal agents), 32 C.F.R. 1624.1 *et seq.* (relating to a registrant's appearance before his local board), 32 C.F.R. 1625.1 *et seq.* (providing for the reopening and reconsideration of a registrant's classification by his local board), and, most particularly, 32 C.F.R. 1626.1 *et seq.*, 1627.1 *et seq.*, and 1628.1 *et seq.*, which provide, respectively, for appeals to State Appeal Boards, appeals to the President (whose authority is exercised by the National Appeal Board), and physical examinations of registrants prior to being ordered to report for induction, and the whole range of procedures relating to these matters.

It should be noted that the standard Notice of Classification (SSS Form 110) provided to all registrants upon their classification or reclassification (see 32 C.F.R. 1623.4) contains a detailed explanation of the registrant's right to take an administrative appeal (see A. 62–63), including information regarding both the timing and manner of appealing a classification to both the State and National Appeal Boards. Cf. *United States* v. *O'Brien*, 391 U.S. 367, 379.

122–123, it held that "[t]he decisions of the local boards made in conformity with the regulations are final even though they may be erroneous"; that they may be overturned "only if there is no basis in fact for the classification" given the registrant. This was confirmed in *Witmer* v. *United States*, 348 U.S. 375, 380–381, where the Court stated that "it is not for the courts to sit as super draft boards, substituting their judgments * * * for those of the designated agencies." See also *Dickinson* v. *United States*, 346 U.S. 389, 396.[7] Indeed, these administrative processes were the conceptual cornerstone for this Court's unanimous decision only last term in *Mulloy* v. *United States*, 398 U.S. 410, 416. There, in requiring local boards to reopen and permit appeals within the System of *prima facie* claims to exemption or deferment tendered prior to the mailing of an induction notice, this Court was guided primarily by the principle that "the opportunity for full administrative review is indispensable to the fair operation of the Selective Service System."

In the instant case, it is undisputed that these administrative processes were cut short, not by any

[7] In *Oestereich* v. *Selective Service Board*, 393 U.S. 233, 238, this Court permitted pre-induction judicial review of action that was "a clear departure by the Board from its statutory mandate" in denying an exemption expressly granted by statute; the situation involved "no exercise of discretion by a Board in evaluating evidence and in determining whether a claimed exemption is deserved." However, the Court went on to state: "Our construction leaves § 10(b)(3) unimpaired in the normal operations of the Act." See *Clark* v. *Gabriel*, 393 U.S. 256.

default of the Selective Service System, but rather because the registrant affirmatively elected to ignore altogether, after his student deferment expired in 1967, the administrative machinery established by Congress and the President. His inaction cannot on this record be attributed to inadvertence, ignorance or mistake, but must instead be recognized as a deliberate refusal to contest and appeal the classification given him by his local board within the Selective Service System (*supra*, pp. 6–8).[8]

A. PETITIONER'S FAILURE TO CONTEST HIS CLASSIFICATION BEFORE HIS LOCAL BOARD OR TO APPEAL ADMINISTRATIVELY PRECLUDES HIS ATTACK ON THAT CLASSIFICATION IN DEFENSE TO A CRIMINAL PROSECUTION FOR REFUSAL TO SUBMIT TO INDUCTION

More than twenty-five years ago, in a criminal prosecution for failure to obey an order to report for civilian work of national importance, this Court, in *Falbo* v.

[8] It is interesting to note that a recent law review comment which proposes statutory expansion of the right to judicial review of Selective Service classifications would not extend the right of judicial review of a classification to a registrant who deliberately ignores possible remedies within the system. Note, *Judicial Review of Selective Service Action: A Need for Reform*, 56 Calif. L. Rev. 448, 463 (1968). That article states: "When the United States Attorney prosecutes a registrant for refusing to submit to induction, the registrant should be permitted to assert the defense of misclassification or unfairness unless he has deliberately or wantonly failed to exhaust his administrative remedies. Because the registrant faces a possible jail sentence, the courts should review the Selective Service action for reversible error to ensure that the registrant is not unjustly convicted of a federal crime. This would not confound any policies underlying the exhaustion doctrine because the courts would not review a classification when the registrant has deliberately or wantonly ignored possible remedies within the system."

United States, 320 U.S. 549, refused to hear a defense of misclassification because the registrant had failed to take all the steps prescribed in the administrative process. Subsequently, when such a defense was heard in *Estep* v. *United States,* 327 U.S. 114, the decision was explained in light of the earlier case on the ground that Falbo had not "exhausted his administrative remedies," whereas Estep "had pursued [his] administrative remedies to the end" (327 U.S. at 123). Following this rationale, the Court has since repeatedly given explicit recognition to the continuing vitality of the exhaustion requirement in Selective Service cases.[9] See, *e.g., Billings* v. *Truesdell,* 321 U.S. 542, 558; *Gibson* v. *United States,* 329 U.S. 338, 349–350; *Sunal* v. *Large,* 332 U.S. 174, 176; *Cox* v. *United States,* 332 U.S. 442, 445, 448; *Witmer* v. *United States,* 348 U.S. 375, 377. See also *Oestereich*

[9] Similarly, the courts of appeals had uniformly held that except in rare cases involving unusual circumstances a registrant's disregard of the administrative appellate processes prevents him from challenging his classification in the courts. See, *e.g.*, among the more recent decisions, *Edwards* v. *United States*, 395 F. 2d 453, 454 (C.A. 9), certiorari denied, 393 U.S. 845; *Kidd* v. *United States*, 386 F. 2d 422, 423 (C.A. 10); *United States* v. *Kurki*, 384 F. 2d 905, 907 (C.A. 7), certiorari denied, 390 U.S. 926; *Dunn* v. *United States*, 383 F. 2d 357 (C.A. 1), certiorari denied, 390 U.S. 982; *Noland* v. *United States*, 380 F. 2d 1016, 1017 (C.A. 10), certiorari denied, 389 U.S. 945. The principle was relaxed in *Donato* v. *United States*, 302 F. 2d 468, 470 (C.A. 9), due to highly unusual circumstances beyond the registrant's control which prevented an administrative appeal. This also was the basis for the decision in *Glover* v. *United States*, 286 F. 2d 84 (C.A. 8).

v. *Selective Service Board,* 393 U.S. 233, 235–236 n. 5; *Clark* v. *Gabriel,* 393 U.S. 256, 259.[10]

The issue whether a registrant's wilful disregard of the administrative appellate processes prevents him from challenging his classification in the courts was again considered recently in *McKart* v. *United States,* 395 U.S. 185. There, the Court carefully re-examined the reasons for the exhaustion doctrine, enunciated broad guidelines for its future application, and determined only that, in the particular circumstances of that case, the equities required relaxation of the principle.

In *McKart,* the question arose because the registrant, who had claimed and been denied by his local board exemption as a "sole surviving son" under Section 6(o) of the Selective Service Act (50 U.S.C. App. 456(o)), failed to seek an administrative appeal of

[10] *Oestereich* and *Gabriel* involved the question of the availability of pre-induction review of allegedly unlawful classifications, as did *Breen* v. *Selective Service Board,* 396 U.S. 460. Whether Section 10(b)(3) of the Act precludes such pre-induction review in particular situations is, of course, a question of interpreting the legislative intent underlying that section; that is not the same as the question whether exhaustion of administrative remedies would be required in a similar situation. It is significant that the Court in *Oestereich* noted that there had been exhaustion of administrative remedies there, in that the registrant "took an administrative appeal and lost" (393 U.S. at 235). In this regard, see also Mr. Justice Harlan's concurring opinion (393 U.S. at 244–245 n. 7), which stated that "a registrant making such a claim [of a statute's or regulation's invalidity] may [not] come into court before he has exhausted his administrative appeals, for the System may decide in his favor on other grounds, obviating the need for further review," but pointed out that "[p]etitioner here has exhausted available remedies." And see dissenting opinion by Mr. Justice Stewart, 393 U.S. at 245, 246–249.

his I–A classification. He, like petitioner in the instant case, explicitly refused to have anything to do with the Selective Service System after filing his claim to exempt status (395 U.S. at 188); McKart was ordered to report for induction and failed to do so. He was prosecuted under 50 U.S.C. App. 462 and raised as a defense the invalidity of his I–A classification.

Noting that the doctrine of exhaustion of administrative remedies is of judicial origin and thus "like most judicial doctrines, subject to numerous exceptions" (395 U.S. at 193), this Court declared that its application, in the absence of an express statutory provision on exhaustion,[11] turns on whether, in a particular situation, "the interests underlying the exhaustion rule clearly outweigh the severe burden imposed upon the registrant if he is denied judicial review" (395 U.S. at 197). Such a governmental interest may arise from the circumstances of a particular case, or "[e]ven if there is no such compelling interest when [an individual] case is viewed in isolation, we must also ask whether allowing all similarly situated registrants to bypass administrative appeal procedures would seriously impair the Selective Service System's ability to perform its functions" (*ibid.*).

In *McKart*, the balance was struck in favor of the registrant. Since the issue on which McKart's proper classification had depended—the meaning of the "sole surviving son" exemption of 50 U.S.C. App. 456(o)—was "solely one of statutory interpretation" (395 U.S.

[11] The Act was similarly silent on this point when petitioner was reclassified I–A in the instant case, and there has been no pertinent change since then (see n. 5 *supra*).

at 197–198), and thus was not the type of question on which the judiciary could expect significant further assistance or enlightenment from the administrative boards,[12] the Court concluded that the equities, on balance, favored not applying the exhaustion doctrine on the particular facts of that case.

The holding, however, is a narrow one; by its terms, it "does not apply to every registrant who fails to take advantage of the administrative remedies provided by the Selective Service System" (395 U.S. at 200). Where such failure deprives the System of an opportunity to assess a claim to exempt status which by nature calls for special "expertise or the exercise of discretion, both by the local boards and the appeal boards" (395 U.S. at 198, 200), the Court observed that "it may be proper to require a registrant to carry his case through the administrative process before he comes into court" (395 U.S. at 200).[13] In this regard, special mention was made in the margin of the *McKart* opinion (395 U.S. at 198, n. 16) of the claim before the Court in the instant case:

> Conscientious objector claims * * * would appear to be examples of questions requiring the application of expertise or the exercise of discretion. In such cases, the Selective Service

[12] Mr. Justice White's concurring opinion noted, further, that there had been "ratification by the State and National Directors of the position taken by petitioner's local board." 395 U.S. at 207.

[13] In distinguishing *Falbo*, *Estep* and their progeny (pp. 18-20, *supra*), the Court noted that those cases had all involved ministerial or conscientious objector claims, that is, "claims that may well have to be pursued through the administrative procedures" established under the Act (395 U.S. at 201).

> System and the courts may have a stronger interest in having the question decided in the first instance by the local board and then by the appeal board, which considers the question anew. 32 C.F.R. § 1626.26. The Selective Service System is empowered by Congress to make such discretionary determinations and only the local and appeal boards have the necessary expertise. * * * [14]

We turn then to the question pointedly left open by *McKart*—whether the exhaustion of administrative remedies doctrine has continuing vitality in Selective Service cases involving conscientious objector claims.

Petitioner contends (Br. 28–33) that the failure of Congress to require registrants to raise all their claims before the appeal boards (*supra*, n. 11) is dispositive of the issue; absent a specific statutory mandate, he

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[14] Consistent with its reservation of conscientious objector cases from the rule of *McKart*, the Court, in *McNeil* v. *United States*, 395 U.S. 463, remanded, *United States* v. *McNeil*, 401 F. 2d 527 (C.A. 4) (a decision—pending on petition for certiorari when *McKart* was decided—in which the exhaustion rule had been applied to the denial of a C.O. claim) to the district court for further consideration in light of *McKart*. There is no warrant for petitioner's assumption (Pet. 13) that the Court, in thus summarily remanding *McNeil*, prejudged the issue which *McKart* had left open. Moreover, the government, in its memorandum to this Court in *McNeil*, had pointed out that, contrary to the court of appeals' assumption in that case, the registrant arguably gave adequate administrative notice of his wish to appeal, so that disposition of the case under the failure-to-exhaust-remedies rationale might have been inappropriate (Memorandum for the United States, No. 1048 Misc., Oct. Term, 1968, pp. 5–6). The government, accordingly, had itself suggested the necessity for remand prior to the decision in *McKart*.

argues, the courts cannot invoke the exhaustion doctrine to bar a defense to criminal prosecution. This contention was considered by the Court in *McKart* (395 U.S. at 197; *id.* at 206 (Mr. Justice White, concurring)) and rejected as a basis for refusing to apply the doctrine in that case (395 U.S. at 193). Plainly, wholesale abrogation of the exhaustion principle in Selective Service cases would be no more appropriate than its undiscriminating application (see *supra*, n. 9). Congress has chosen to commit the resolution of draft classification questions in the first instance to the discretion and expertise of local and appeal boards. *Estep* v. *United States, supra;* and see *Oestereich* v. *United States,* 393 U.S. at 245, 246–249 (Mr. Justice Stewart, dissenting). In so doing, it has carefully circumscribed the scope of judicial review of the administrative determination (pp. 15–17, *supra*). Within this statutory framework, the exhaustion doctrine serves an important and useful function; when properly applied, it prevents improper encroachment of the judicial branch into an area reserved for the Executive through a particular agency. It is, as this Court pointed out in *McKart* (395 U.S. at 194), "an expression of executive and administrative autonomy" on matters legislatively assigned to agency discretion or expertise.

Analysis of conscientious objector claims is particularly suited to the exercise of this discretionary power granted local and appeal boards by Congress, since it depends in large part on an appraisal of the registrant's subjective state of mind, "the sincerity of the beliefs described in his SSS Form 150." *Lockhart* v. *United States,* 420 F. 2d 1143, 1145 (C.A. 9); see

Witmer v. *United States*, 348 U.S. 375. When, as happened in the instant case, the registrant deliberately deprives the administrative agency of an opportunity to go beyond the four corners of the application in order to bring its recognized expertise (pp. 22–23, *supra*) to bear on the question whether the asserted beliefs are "truly held" (cf. *United States* v. *Seeger*, 380 U.S. 163, 185), we submit that the interests embodied in the exhaustion rule are sufficiently strong to compel its application.

The interests to be considered were summarized by this Court in *McKart* (395 U.S. at 194–195) in the following manner: (1) "judicial review may be hindered by the failure of the litigant to allow the agency to make a factual record, or to exercise its discretion or apply its expertise"; (2) judicial efficiency is furthered by the fact that a "complaining party may be successful in vindicating his rights in the administrative process," with the consequence that "[i]f he is required to pursue his administrative remedies, the courts may never have to intervene"; (3) "notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors"; and (4) "frequent and deliberate flouting of the administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures." All four considerations support an application of the exhaustion doctrine in the instant case.

This Court has long recognized that "the ultimate question in conscientious objector cases is the sincerity of the registrant in objecting, on religious grounds, to participation in war in any form." *Witmer* v. *United*

States, 348 U.S. 375, 381. Manifestly, therefore, the classification question involved here is not "solely one of statutory interpretation" (395 U.S. at 197–198); its resolution, instead, requires precisely the kind of factual analysis that Congress intended should be left, in the first instance, to the discretion and expertise of the Selective Service System. See *Thompson* v. *United States,* 380 F. 2d 86 (C.A. 10); *Lockhart* v. *United States,* 420 F. 2d 1143 (C.A. 9). Petitioner's failure to appear personally before his local board, to confer with the government appeal agent, though he was afforded ample opportunity to do so (*supra,* p. 8),[15] or to appeal the denial of his conscientious objector claim within the System,[16] effectively denied the adminis-

[15] This case is unlike *United States* v. *Davis,* 413 F. 2d 148 (C.A. 4), where the failure of the local board to comply with its duty to advise the registrant of the availability of a government appeal agent to apprise him of his rights, including his right of appeal (413 F. 2d at 149–150), was held to create "special circumstances" sufficient to "excuse the registrant from the ordinary consequences of his failure to administratively appeal" (*id.* at 151; see *supra,* n. 9). Here, the notice found lacking in *Davis* was contained in the communication which the local board sent to petitioner when he was reclassified I-A and which petitioner returned to the board unopened. Thus, *Davis* cannot avail petitioner, "who had advised the local board in no uncertain terms that he would not read anything they sent him, and would not have appealed no matter what he was told" (A. 78).

[16] The majority below found (A. 74–75) that the local board had passed on the merits of McGee's conscientious objector claim at the time it reclassified him I-A in 1967. If the denial was without any basis on the facts submitted in McGee's SSS Form 150—and it is conceded that the form presented *a prima*

trative system an opportunity to correct its alleged error by making factual findings essential to determination of his claim, as well as denying it a full opportunity to apply its expertise to the evaluation of his written submission.[17]

The purpose, then, in requiring adherence to the prescribed administrative review procedures here is both

facie claim—this is precisely the type of error which the personal appearance and administrative appeal are designed to expose. It is well recognized that appeal boards do not perform merely a reviewing function; by specific regulation, they classify independently and *de novo*. 32 C.F.R. 1626.26(a). See *DeRemer* v. *United States*, 340 F. 2d 712, 719 (C.A. 8), and cases there cited. If they are presented with a local board denial of a *prima facie* claim, where on the record before them it is unclear, as here, whether an evaluation has been made of the registrant's sincerity, appeal boards can, if in their discretion it seems appropriate, grant the conscientious objector exemption, and that action "completely supersedes the action of the local board," *Clay* v. *United States*, 397 F. 2d 901, 913 (C.A. 5), vacated and remanded on other grounds *sub nom. Giordano* v. *United States*, 394 U.S. 310; *United States* v. *Chodorski*, 240 F. 2d 590, 591–592 (C.A. 7), certiorari denied, 353 U.S. 950; or, alternatively, they can suggest that the local board conduct a personal interview to ascertain the truth and sincerity of the professed beliefs set forth in the SSS Form 150. Plainly, either course would have enabled the agency to discover and correct any errors it might have committed and, quite possibly, as pointed out below (A. 73), would have led "to McGee's obtaining a I–O classification and have avoided the judicial—and prosecutorial—effort that his flouting of the processes of the Selective Service System has caused."

[17] While the principal fact-issue calling for the "discretion and expertise" of the local and appeal boards in appraising the validity of conscientious objectors' claims concerns the question of the registrant's sincerity, there is also the question whether the reg-

to enable the agency "to discover and correct its own errors"—an important objective whether the alleged error be one of substance or, as petitioner contends in the instant case,[18] one of procedure—and more fundamentally, to assure that, in so doing, the agency is provided with sufficient opportunity to make the factual findings, exercise the discretion and apply the expertise which, in the first instance, "Congress properly placed with the local and appeal boards of our Selective Service System." *Lockhart* v. *United States*, 420 F. 2d 1143, 1146 (C.A. 9). Petitioner is in the untenable position of asking the courts to substitute themselves for the com-

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istrant's stated beliefs qualify for the statutory exemption—that is, whether his objection is "religious," in the broadest sense of the word (*Welsh* v. *United States*, 398 U.S. 333), or "rests solely upon considerations of policy, pragmatism, or expediency" (398 U.S. at 340–41); or whether his objection is to participation in war in any form, as distinguished from participation in a particular war, or a particular sphere of combat in a particular war (see our brief in *Gillette* v. *United States* and *Negre* v. *United States*, Nos. 85 and 325, this Term). Such determinations turn, in the first instance, on questions of fact to which both the local and appeal boards can bring a special expertise (see, *e.g.*, Local Board Memorandum No. 107: *Criteria for Classification of Conscientious Objectors*, issued by the National Director on July 6, 1970); they do not involve purely questions of law or statutory interpretation, as *United States* v. *Eades*, 430 F. 2d 1300 (C.A. 4), and *United States* v. *Davila*, 429 F. 2d 481 (C.A. 5), seem to suggest.

[18] Petitioner argues, as did the dissent below, that the local board's action was void because it never passed on the merits of

petent administrative agency with respect to essential aspects of his claim (see pp. 15–18 *supra*).

If registrants seeking exemption as conscientious objectors are permitted thus to bypass with impunity the established administrative machinery for factfinding and review, there exists a real possibility that the effectiveness of the System will be weakened. For, as this case unquestionably demonstrates, it will enable such registrants to bring before the courts, in the context of criminal prosecutions, *prima facie* claims to exempt status without ever

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his conscientious objector claim. The contention is not (A. 66 n. 1) that the board wilfully refused to consider the claim on receipt of McGee's letter to the President (cf. *Oestereich* v. *Selective Service Board*, *supra*; *Breen* v. *Selective Service Board*, 396 U.S. 460); rather it is that, due to an inadvertent oversight (A. 75), the board based its 1967 denial of the claim on a previous determination in March 1966 that McGee, only because he then held a "lower" II-S classification (see 32 C.F.R. 1623.2), was not entitled to conscientious objector status (A. 35). Even if this were the case (but see *supra*, n. 16), such an inadvertent failure is, as the majority noted below (A. 75–76) precisely the kind of procedural error that a personal appearance before the board—at which the registrant is entitled, among other things, to point out the class in which he thinks he should have been placed and "direct attention to any information in his file which he believes the local board has overlooked" (32 C.F.R. 1624.2(b))—is designed to reveal and remedy. Moreover, though the error is not one which appears on the face of the record before the appeal board, it is true that "communication between the appeal board and the local board," as the majority pointed out (A. 75 n. 10), "could well have developed the true facts."

having them meaningfully examined by the administrative agency from the point of view of the registrant's sincerity. Since the court is in no position to pass upon sincerity (*Witmer* v. *United States, supra*) and the board has evidently not done so, a carefully drawn SSS Form 150 would in this situation virtually assure acquittal on the ground that the record shows "no basis in fact" for denial of a conscientious objector exemption. We cannot ignore the fact that draft counseling has recently become a most sophisticated business. See, *e.g., From 1–A to 4–F And All Points In Between,* New York Times Magazine, p. 34, November 29, 1970. Thus, it is not unlikely that those having access to "expert" assistance in the drafting of their conscientious objector claims will be encouraged, if permitted by this Court to do so, to avoid the administrative remedies, which would necessarily subject the sincerity of their professed beliefs to scrutiny, and take a chance on asserting the defense of misclassification in criminal prosecutions, with resulting delay. The consequent disruption such delaying tactics would have on the System is manifest.[19]

For sound pragmatic and policy reasons, then, the exhaustion doctrine should apply here to preclude petitioner from raising the invalidity of his I–A classification as a defense to his criminal prosecution. While such a result may seem harsh in light of the *prima*

[19] Not to be overlooked is the fact that the delay occasioned by such tactics, which may well be considerable, weighs most heavily on those registrants not contesting their I–A classification who are called up sooner than they should be to fill the vacancies in the board quotas.

facie validity of his claim to conscientious objector status, that is necessarily the case whenever the exhaustion of remedies doctrine is determinative. As Judge Friendly's majority opinion below aptly stated (A. 76):

> * * * [T]he fact that McGee had a good factual case for appeal in no way points against insistence on his taking one; a case of statutory construction like *McKart* differs since on such a matter there is a positive advantage in resort to the courts which alone can decide the issue authoritatively and uniformly for the benefit of all registrants. Instead McGee's stiff-necked refusal to have any dealings with the Selective Service System has caused the expenditure of countless hours by prosecutors, grand and petit jurors, and judges of the trial and appellate courts. If we were free to look at his case alone, we might still be tempted to take the charitable view of our dissenting brother. But if we should do that in McGee's case, we would be obliged to do it in every other similar one. Of course it seems "harsh" when the exhaustion requirement results in a conviction for refusal to submit to induction by a registrant with a seemingly good claim for exemption. But one of the main points of the exhaustion doctrine is to relieve the courts from having to consider claims that ought to be dealt with in the first instance by administrative agencies; it cannot properly be limited to those persons whose claims would fail in court anyway.[20]

[20] Petitioner argues that the requirement that administrative remedies be exhausted applies properly only where the effect is to delay judicial review, not where, as here, the effect is to deny

B. PETITIONER DID NOT QUALIFY HIMSELF FOR EXEMPTION AS A MINISTERIAL STUDENT

1. Petitioner also contends that he was erroneously denied a IV–D (ministerial student) exemption (Pet. Br. 45–52), based on the fact that on September 27, 1967, a week after he was reclassified I–A and about three-and-a-half months before he was ordered to report for induction, he matriculated at Union Theological Seminary, a non-denominational divinity school (*supra*, p. 9).[21] But petitioner never requested a IV–D classification and never informed his local board that he was attending this school. Even assuming that attendance at the school would have sufficed, without more, to establish entitlement to a IV–D exemption—we point out below that it would not—he cannot complain of the board's failure to grant him an exemption

judicial review. To be sure, the applicable considerations are different where a future opportunity to pursue the administrative remedies remains, and exhaustion may more freely be required in that situation. But, for the reasons discussed in *McKart* and in this brief, it is plain that a deliberate flouting of administrative processes need not be excused simply because the individual has wilfully allowed matters to come to such a pass that those processes are no longer available. It might be that the present situation should be conceptualized in terms of waiver rather than "exhaustion" in the sense in which it is used in other administrative law contexts. It is, of course, a common concept in the criminal law that a defendant may forfeit important rights, both procedural and substantive, by knowing waiver. This Court recognized long ago, in *Yakus* v. *United States*, 321 U.S. 414, 444, that "* * * no * * * provision of the Constitution * * * precludes Congress from making criminal the violation of an administrative regulation, by one who has failed to avail himself of an adequate separate procedure for the adjudication of its validity * * *."

[21] Petitioner was still attending the school, as a second-year student, at the time of trial, in November 1968 (Tr. 86–87, 97).

based on facts that he chose not to give the board. Since the local board "has the responsibility of classifying registrants," obviously it must "be given the information necessary to perform its function." See *McKart v. United States, supra*, 395 U.S. at 198 n. 15.[22] With respect to his IV–D claim, petitioner failed not only to exhaust his administrative remedies, but even to invoke the administrative processes in the first instance.

Nor is there substance to the suggestion that the board should have known, without being informed by him, that petitioner was a student at the school, or that the board at least had enough information to impose on it a burden to discover that fact through inquiry (Pet. Br. 47–51). None of the incidents cited in support of the contention (Pet. Br. 47) is germane. Certainly the fact that petitioner informed President Johnson (in his April 1967 letter transmitting his mutilated draft cards) that he had been "accepted for" graduate study in a program that "would probably" qualify him for the theological deferment

[22] The dissent did not disagree with the majority on this issue, observing that the registrant's lack of standing to challenge his classification in the courts is clear when he has "ignore[d] the local board altogether and give[n] it no facts at all" (A. 85). See also 32 C.F.R. 1622.1(c) (each registrant to be considered available for military service until his eligibility for deferment or exemption "is clearly established to the satisfaction of the local board"). And see *Dickinson* v. *United States*, 346 U.S. 389, 395: "[S]ince the ministerial exemption is a matter of legislative grace, the selective service registrant bears the burden of clearly establishing a right to the exemption." Petitioner expressly acknowledged at the trial his awareness that to be entitled to an exemption one must claim it (A. 38).

(*supra*, pp. 6–7) is not pertinent.[23] Aside from its patent vagueness, the statement antedated petitioner's matriculation by five months. A registrant's representation concerning an anticipated future status plainly cannot be regarded—should the expectation be realized—as after-the-fact notice of the event.[24] Even less relevant is the fact that in May 1967, four months before his enrollment, petitioner told two F.B.I. agents, neither of whom had any connection with the board, that he planned to attend the school (A. 24–25), or that a third agent, at about the same time, asked a board clerk whether petitioner's classification would be affected *if* he did so (A. 20–21). Petitioner's reliance on the fact that after his matriculation he advised an Assistant United States Attorney, at a November 1967 grand jury inquiry concerning the burning by

[23] At noted *supra*, p. 7, the local board received a copy of the letter, through official channels, soon after its transmittal.

[24] Local board chairman Lande observed with reference to this statement that a registrant's classification must be based on his current status, not on "something * * * [he] says will happen in the future" (A. 37). Even if it were thought that the board's receipt of the statement shifted the burden to it to inquire further, that duty was in any event discharged. The Current Information Questionnaire (SSS Form 127) which the board sent to petitioner in July 1967, and which petitioner specifically refused to fill out, inquired whether he was to be a student the next semester and, if so, at what school. Petitioner was further instructed in the Form that he might attach any additional information he believed should be brought to the board's attention (*supra*, p. 7). Petitioner's suggestion that the board, upon receipt of his refusal to respond to this questionnaire, should have "solicited the information directly from the school" (Pet. Br. 48, n. 15) not only would push beyond reason the board's hypothesized duty of inquiry, it also overlooks the fact that petitioner had not told the President what school had accepted him for graduate theological study.

petitioner of his draft cards, that he was then attending the school (A. 39) is likewise misplaced. That information, given to a government prosecutor in the course of a criminal inquiry to which it was irrelevant, was not by any reasonable standard imputable to the local board. Petitioner does not suggest that the prosecutor reported the information to the board—or indeed that he had any reason to add such action to his regular duties.

2. Moreover, even if petitioner had properly requested a IV–D exemption, and had informed the local board of the facts on which he relied at trial, he would not have been entitled to the classification. To be entitled to a ministerial student exemption, a registrant must be satisfactorily pursuing a full-time course of instruction in a recognized divinity school *and* be "preparing for the ministry under the direction of" a recognized church or religious organization (50 U.S.C. App. 456(g); 32 C.F.R. 1622.43(a)(3)). Even at the trial, where petitioner first claimed this exemption and evidence on the issue was liberally received, there was no proof that the latter requirement was met. There was some evidence—his own statement—that petitioner, a Catholic, intended some day to become a priest (A. 39). But there was no evidence that at Union Theological Seminary—a nondenominational school—he was preparing for the ministry under the direction of the Catholic Church—or of any other religious group. His parish priest testified that he had recommended petitioner to Union (Tr. 93–94), but that could have meant, as the court below observed (A. 69), no more than that he thought

petitioner a serious and decent young man. The evidence showed that there were Catholic students other than petitioner at Union, some of whom had manifested an intention of becoming priests. Most of those students, however, were enrolled at Catholic seminaries and were merely taking additional special courses at Union (A. 22–23). If those students qualified for the IV–D exemption, it was because they were seminarians, as petitioner was not. While petitioner had at one time been enrolled in a Catholic seminary, preparing for the ministry under the direction of his Church, he had left that seminary five years previously and had in the interim spent three years in, and graduated with a Bachelor of Science degree from, a secular university—in addition to engaging in a variety of other secular pursuits (*supra*, pp. 3–4, 7) Accordingly, petitioner has not to this day established facts requiring a IV–D exemption.[25]

[25] The trial judge found as a fact that petitioner then was, and when he refused induction had been, pursuing a full-time course of instruction in a recognized divinity school, Union Theological Seminary, but that the school "was [not] under the direction of a recognized church or religious organization, but rather * * * was * * * a non-denominational seminary" (A. 41–42). The court of appeals noted that if the judge thereby meant that the divinity school itself has to be under the direction of a recognized church or religious organization in order for its students to qualify for IV–D exemption he would have misinterpreted the statute (50 U.S.C. App. 456(g))—since under the statute it is the student's studies, not the school, that must be under the direction of a recognized religious group (A. 70, n. 5). The court, however, did not so interpret the judge's finding. It believed that all the judge meant was that, since Union Theological Seminary was non-denominational, the nature of the school could not of itself supply the necessary element of "direction"—as might be the case, for example, if the

II. PETITIONER'S CONVICTIONS ON THE OTHER COUNTS NEED NOT BE CONSIDERED IF THE CONVICTION FOR FAILURE TO SUBMIT IS AFFIRMED; IN ANY EVENT THEY WERE PROPER

A. AFFIRMANCE OF COUNT I OBVIATES CONSIDERATION OF THE OTHER COUNTS

Petitioner's challenges to his convictions on Counts II (failure to report for his pre-induction physical examination) and III (failure to keep in his possession his I–A Notice of Classification) both presuppose the invalidity of the I–A classification upon which the Count I conviction rests (Pet. Br. 52–56). The majority of the court below accordingly found it unnecessary to consider these two counts, and this Court presumably would as well if it accepts our arguments in the preceding section of this brief.

The majority below further found it unnecessary, under the concurrent sentence doctrine (see *Hira-*

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seminary were denominational. So read, of course, the finding involved no misconstruction of the statute. While we agree with the court of appeals' analysis, we also note that even if the judge in fact misinterpreted Section 456(g), the error was harmless. We have argued, above, that a registrant who has never requested a particular exempt status, or supplied his board with information pertinent to such a request, may not be heard to contend, in a prosecution for violating a board order, that the board erred in not granting the exemption. If this seemingly indisputable proposition is sound, the judge should not have permitted petitioner to attempt to show at the trial that he in fact qualified for the ministerial student exemption, and should have excluded the evidence tendered on the issue. Had he done so, he would of course have had no occasion to consider Section 456(g). It was, in short, only in consequence of an error in petitioner's favor as to the scope of the trial issues that the possible error of construction occurred.

bayashi v. *United States*, 320 U.S. 81, 85), to consider the conviction under Count IV (refusal to furnish the local board with the information requested in the Current Information Questionnaire sent petitioner in July 1967 following completion of his undergraduate education). This was permissible, as a matter of discretionary judicial convenience, under *Benton* v. *Maryland*, 395 U.S. 784, 791; see, *e.g.*, *United States* v. *Barsaloux*, 419 F.2d 1299, 1300 (C.A. 5), certiorari denied, 397 U.S. 972. The same exercise of discretion by this Court would be appropriate if the basic conviction for failure to submit to induction is affirmed. Since that offense is plainly the most serious of those charged, it is reasonable to infer that it was the basis for the two-year sentence, rather than the offense charged in Count IV (and those of Counts II and III). This would seem to be a rather clear case for a judicial determination not to review a conviction absorbed in a concurrent sentence.

B. EVEN IF COUNT I WERE REVERSED, THE OTHER COUNTS SHOULD STAND, WITH RECONSIDERATION OF THE SENTENCE

If, contrary to the arguments we have made, this Court were to reverse petitioner's basic conviction for failure to submit, it would be appropriate to remand the incidental counts for consideration by the court of appeals; the questions raised with respect to these counts are not of such import as to require this Court's immediate consideration. We submit, however, our reasons for believing that petitioner was properly punishable, under 50 U.S.C. App. 462(a), for these instances of deliberate nonperformance of duties reason-

ably imposed upon him under the Selective Service laws and regulations.

1. Even if his classification is invalid, a registrant is not ipso facto relieved of his obligation to obey an order to report for a physical examination

Petitioner argues that the Count II conviction should be set aside because he would not have been subject to any duty to have a physical examination if he had been classified—as he alleges he should have been at the time of the order—as a conscientious objector or as a ministerial student. We agree that petitioner would have had no such obligation if he had been so classified,[26] but it does not follow that this

[26] An order to report for physical examination (SSS Form 223) is sent not only to registrants eligible for military service (Classes I-A and I-A-O), but also to those in Class I-O (32 C.F.R. 1628.10, 1628.11(b)). But whereas I-A and I-A-O registrants are required, subject to the criminal sanctions of the Act, to comply with their orders, this is not true of I-O registrants. The order sent to the I-O registrant is solely for his own protection—its purpose being to ensure that he will not be required to perform the civilian service which the Act requires of him in lieu of induction unless he meets the Army's standards of physical fitness. For this reason the I-O registrant can choose to forego the prescribed Armed Forces physical examination—in which event he may be ordered to perform the required civilian service "in the same manner as if [he] had taken the examination and had been found qualified for military service" (SSS Form 223). See also 32 C.F.R. 1660.20(a) (I-O registrant to submit to his local board proposed types of civilian work after he has been found qualified for military service at his Armed Forces examination *or* he has "failed to report for or submit to" such examination). And see *United States* v. *Mendoza*, 295 F. Supp. 673, 683 (E.D. N.Y.); *United States* v. *Walsh*, 279 F. Supp. 115, 118–119 (D. Mass). Cf. *Shoemaker* v. *United States*, 413 F. 2d 274, 275 (C.A. 9), certiorari denied, 396 U.S. 837.

form of self-help was justified even if an exempt classification was improperly denied. As this Court observed in *McKart* v. *United States, supra,* 395 U.S. at 203, "[a]n invalid classification * * * would not be a defense today to a prosecution for failure to report for a pre-induction physical examination."

To be sure, a registrant can resist an order to report for induction with impunity if that order turns out to be invalid; that is, indeed, the normal way to assert judicially his right to avoid military service not owed, after the selective service process has been completed. But that does not mean that his belief that his classification is improper permits him to ignore the board's intermediate directives, which subject him to no such grave consequences;[27] petitioner cannot claim that a physical examination would have harmed him or even substantially inconvenienced him, but allowing registrants to ignore such orders would plainly disrupt the reasonably efficient functioning of the system, in which there is a strong public interest.[28] See,

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[27] But cf. *United States* v. *Brandt*, C.A. 9, No. 25,486, decided December 4, 1970, where the court set aside a conviction for failure to report for a physical examination because the underlying I–A classification was invalid as a matter of law, under the authority of *Gutknecht* v. *United States*, 396 U.S. 295. Here the challenge to the I–A classification turns on a question of disputed fact and not a question of law.

[28] Cf. 32 C.F.R. 1628.11(b) (registrant may be required to undergo preinduction physical examination "without regard to whether an appeal has been or will be taken"). And see *United States V. Hertlein*, 143 F. Supp. 742, 744 (E.D. Wis.) (defendant had duty to take his physical examination as ordered "whether or not an appeal was pending"). Under the cited regulation, a registrant who ignored an order to report for a physical examination while appealing his I–A classification could

e.g., United States v. *Nugent,* 346 U.S. 1, 9; *Falbo* v. *United States,* 320 U.S. 549, 553.

2. Similarly, an improper classification would not eliminate the obligation to retain possession of the Notice of Classification

Count III charged that petitioner knowingly failed to keep in his possession the I–A Notice of Classification that was mailed to him in September 1967 (A. 5–6). The pertinent regulation (32 C.F.R. 1623.5) requires each registrant who has been classified to have in his possession at all times "a valid Notice of Classification (SSS Form 110)" showing his current classification. Petitioner argues that because his I–A classification was invalid he had no duty under the regulation to retain the Notice (Pet. Br. 55–56). The dissent below found this argument "particularly" unpersuasive (A. 88), and we agree. There is no suggestion either in the text or the context of the regulation that the qualifier "valid" relates to the correctness of the classification. It is the phrase "Notice of Classification (SSS Form 110)" that is modified; all that is meant is that the certificate be authentic and properly executed, an attribute that petitioner does not contest.[29]

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not be heard to contend, should the appeal be successful, that he committed no offense in disobeying the order. Thus, should his challenge here to his I–A classification be sustained, petitioner would be in no essentially different posture as regards his challenge of the order to submit to a physical examination.

[29] In *United States* v. *Hertlein,* 143 F. Supp. 742, 746–747 (E.D. Wis.), cited by petitioner (Pet. Br. 56), the regulation in issue was held not to apply to a classification notice advising the registrant of a classification which the local board had had no "jurisdiction" to make—because of the pendency of an appeal from a prior classification at the time the board acted.

3. The conviction for refusal to answer a Selective Service questionnaire is valid

Petitioner concedes (Br. 58), with respect to Count IV, that his failure to respond to the Current Information Questionnaire sent him in July 1967 upon the completion of his schooling at the University of Rochester "undoubtedly violated" 32 C.F.R. 1641.7(b); it is not disputed that petitioner received the questionnaire and deliberately refused to fill it out. He argues, however, that the violation was "technical" only, claiming that the information sought was in the board's possession already, or was furnished to the government indirectly before the charges were brought, and would in any event have been beneficial rather than harmful to petitioner's claims; he further contends that the sole sanction for noncompliance with requests for information should be the forfeiture of any claimed exemption or deferment, to the exclusion of criminal liability (Pet. Br. 57–62). These arguments are plainly inconsistent with the categorical language of the regulation, which provides that each registrant "shall submit to his local board in writing all information which the local

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Since the instant case involves no comparable situation, that decision, assuming it to be sound, is distinguishable. There is no question in this case of the local board's authority to act when it took the action which petitioner challenges.

Petitioner's further suggestion that a classification notice showing an "incorrect classification" could serve none of the functions of such a certificate discussed in *United States* v. *O'Brien*, 391 U.S. 367 (Pet. Br. 55–56), is incorrect. Such a certificate—to cite but one example—would certainly be as useful as one whose validity was unquestioned in carrying the "continual reminder" to the registrant that he must notify his local board of any change of address and other specified changes in his status (391 U.S. at 379).

board may at any time request from him * * *" (32 C.F.R. 1641.7(b)). And there is nothing in the Act or regulations which suggests that the criminal penalty for violations of the regulations generally (50 U.S.C. App. 462(a)) does not apply to this regulation. The Selective Service System could not function without such elementary cooperation by registrants; we are not dealing here with a minor lapse, but with flat defiance of a reasonable request for information not readily available to the local board otherwise, and which petitioner never provided to it.[20]

* * * * * * *

While it is our view, for the reasons stated, that the convictions on the three subsidiary counts should be sustained even if the principal conviction is held invalid, it would be appropriate, if the Court should reverse as to Count I, to remand the case to the district court for reconsideration of the sentences on the lesser counts. In giving concurrent two-year sentences on each of the latter counts the trial judge may have

[20] *United States* v. *Norton*, 179 F. 2d 527 (C.A. 2), relied on by petitioner (Pet. Br. 59-60), does not support his position. That case held merely that it is not an offense for a registrant to refuse to sign his registration card when registering, in light of the specific provision of the regulations that in the event of such refusal the registrar shall sign the registrant's name for him, with the same force and effect as if the registrant had done so (former 32 C.F.R. 613.13(c); now 32 C.F.R. 1613.13(c)). The regulation, in short, "condon[ed] * * * the refusal" (179 F. 2d at 529) But petitioner here did more than refuse to sign his name; he refused to supply requested information. That the distinction is critical was noted, indeed, by *Norton* itself (*ibid.*).

Petitioner's contentions largely take the form of objections to the instructions given to the jury on this count. But petitioner failed to object to the instructions when given (Tr. 245-247, 293-296), and so cannot object here. Rule 30, F. R. Crim. P.

been influenced by the seriousness of the principal conviction. Should the principal conviction be held invalid, therefore, the judge should be given the opportunity to reconsider the sentences imposed on the other counts. Cf. *Yates* v. *United States*, 355 U.S. 66, 356 U.S. 363; *United States* v. *Hines*, 256 F. 2d 561, 563, 564 (C.A. 2); *United States* v. *Barash*, 365 F. 2d 395, 403 (C.A. 2).

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed. Should the Court reverse the conviction for refusing to submit to induction, it should remand the case to the court of appeals for consideration of the convictions on the other counts, or in the alternative affirm as to those counts but remand to the district court for reconsideration of the sentences thereunder.

Respectfully submitted.

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